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ELANCOVEN SINGARAM

v.

PP

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HIGH COURT MALAYA, PULAU PINANG
ZAMANI A RAHIM J
[CRIMINAL APPEALS NO: 41S-58-08-2013 &
41S-59-08-2013]
4 DECEMBER 2013

C

EVIDENCE: *Cross-examination - Hostile witness - Right to cross-examine hostile witness - Whether procedure complied with - Whether provisions of law relied on clearly identified - Evidence Act 1950, s. 154*

D

CRIMINAL PROCEDURE: *Trial - Witness - Examination of witness - Effect of declaring own witness hostile - Failure to allow opportunity to defence to cross-examine prosecution's witness - Whether Magistrate erred in law and fact - Whether accused accorded fair trial - Whether resulted in miscarriage of justice*

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The accused was separately charged for the offence of self-administration or consumption of dangerous drugs, an offence under s. 15(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and possession of cannabis, an offence under s. 6 of the Act, punishable under s. 39A(1) of the same Act. At the close of the

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prosecution's case, he was acquitted and discharged without his defence being called in respect of the offence under s. 15(1)(a) of the Act. There was no appeal by the prosecution. However, in respect of the offence under s. 6 of the Act, a *prima facie* case was established against the accused and he was called to enter his

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defence. At the end of the trial, the accused was found guilty, convicted and sentenced to two years imprisonment. Hence, this appeal. Briefly, the facts showed that the prosecution, in the course of examination-in-chief, had applied to declare its own witness, the accused's wife ('SP9'), as hostile witness pursuant to

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s. 154 of the Evidence Act 1950, as her evidence appeared to have contradicted with her recorded statement. Whilst SP9 was being cross-examined, the Magistrate intercepted and told counsel to cease cross-examining and allowed the prosecution's application to declare the accused's wife as a hostile witness. The issues that

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arose for consideration, *inter alia*, were: (i) whether the Magistrate had erred in law and fact in her failure to allow opportunity to

the defence to cross-examine SP9 who was the key witness in this case, until the end; and (ii) whether a miscarriage of justice had occurred.

Held (allowing appeal; setting aside conviction and sentence):

(1) The procedure adopted to treat SP9 as a hostile witness was not in accordance with the procedure laid down in *Re Wee Swee Hoon, Deceased; Lim Ah Moy & Anor v. Ong Eng Say*. It was unknown under what provision of the law that the statement of SP9 was tendered. It was not marked as an exhibit, and therefore it did not form part of the appeal record. It was also not shown to counsel and invited submissions thereon. (paras 9 & 16)

(2) It was wrong for the Magistrate to make an immediate summary order directing counsel to cease cross-examination of SP9 on the ground that she was an unreliable witness, in which, the Magistrate did not accept her evidence. The Magistrate should have allowed counsel to complete the cross-examination as the cross-examination was very wide and subjected to the rule of admissibility and relevancy. Further, the credibility of SP9 should have been appropriately assessed after the prosecution had closed its case. (para 21)

(3) The witness must be offered and produced, not by the defence, but by the prosecution for the purpose of the former completing his rights of cross-examination of the witness. Without an opportunity being offered or made available for continued cross-examination there was insufficient compliance with the requirements of the law (*Kamalan Shaik Mohd v. PP*). The accused had not been accorded with a fair trial in light of the denial of the right of the accused to cross-examine SP9 and the non-compliance of the procedure by the prosecution to treat its own witness as hostile. Hence, there was miscarriage of justice. (paras 22 & 23)

Case(s) referred to:

Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***

Kamalan Shaik Mohd v. PP [2013] 4 CLJ 396 HC ***(foll)***

Khoo Cheng Huat v. PP [1990] 2 CLJ 790; [1990] 2 CLJ (Rep) 236 HC ***(refd)***

Krishnan & Anor v. PP [1981] 1 LNS 206 FC ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

A *PA Anselam v. PP [1940] 1 LNS 64 HC* ***(refd)***
Re Wee Swee Hoon, Deceased; Lim Ah Moy & Anor v. Ong Eng Say [1953] 1 LNS 92 HC ***(foll)***
Sebastiano Robert Pavone v. PP [1985] 2 CLJ 91; [1985] CLJ (Rep) 753 HC ***(refd)***
B *Yuen Chun Yii v. PP [1997] 3 SLR 57* ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 15(1)(a), 39A(1)
Evidence Act 1950, ss. 145(1), 154, 155(c)
Federal Constitution, art. 5(1)

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Other source(s) referred to:
Sarkar's Law of Evidence, 16th edn, 2007, p 2426

For the appellant/accused - Pamela Vijayrani, M/s Noraishah Ismail, Pamela Vijayrani & Co
D *For the respondent - Shakila Banu Sheik Allaudeen, DPP*

[Appeal from Magistrate Court, Seberang Perai Selatan; Arrest Case No: 83-884-11-2012]

Reported by Shah Saharudin

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JUDGMENT

Zamani A Rahim J:

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[1] The appellant ("accused") was separately charged with an offence of self-administration or consumption of dangerous drugs an offence under s. 15(1)(a) and possession of cannabis an offence under s. 6 punishable under s. 39A(1). Both offences are under the Dangerous Drugs Act 1952 ("the Act"). The amended charge
G under s. 6 which is punishable under s. 39A(1) reads as follows:

(1) Amended Charge

Bahawa kamu pada 16.9.2012 jam lebih kurang 10.00 malam di
H No. 17 Lorong Ketitir 5A Taman Ketitir, 14200 Sungai Bakap, dalam Daerah Seberang Perai Selatan, dalam Negeri Pulau Pinang, telah didapati ada dalam milikan kamu dadah berbahaya jenis cannabis seberat 48.90 gram. Oleh itu, kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) (sepatutnya dibaca s. 6) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah
I seksyen 39A(1) Akta yang sama.

[2] At the close of the prosecution's case, the accused was acquitted and discharged without his defence being called in respect of the offence under s. 15(1)(a) of the Act. There was no appeal by the prosecution. However, the accused's defence was called in respect of the offence under s. 6 and punishable under s. 39A(1) of the Act as the prosecution had succeeded in establishing a *prima facie* case against the accused.

[3] At the end of the trial, the accused was found guilty, convicted and sentenced to two years imprisonment with effect from the date of conviction.

[4] Dissatisfied with the conviction and sentence, hence this appeal.

[5] The accused has advanced a total of 23 grounds of appeal, but of significance is ground No. 17 which reads as follows:

> Yang Arif Majistret telah terkhilaf dari segi undang-undang dan fakta apabila beliau gagal memberi peluang untuk pihak pembelaan menyoal balas saksi pendakwaan, SP9 sehingga habis, selaku isteri Perayu yang merupakan saksi utama dalam kes ini.

[6] In the light of the above stated ground of petition, it is unnecessary to dwell and narrate the facts of the case in any great details. It is sufficient for me to focus on the evidence given by the accused's wife, Rajamal a/p Ramasamy, SP9. The relevant part of the notes of proceedings at p. 105 para. D jilid 1 of the record of appeal reads as follows:

> TPR: Di tahap ini, saya ingin buat permohon untuk jadikan saksi ini sebagai hostile witness. Keterangan saksi ini berbeza dengan rakaman percakapannya. Rakaman percakapan Rajamal a/p Ramasamy dikemukakan.
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> Mahkamah: Permohonan dibenarkan.
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> (p. 105 of Appeal Record)

[7] In the course of examination-in-chief, the prosecution applied to the court to declare its own witness, SP9 as hostile. Section 154 of the Evidence Act 1950 which allows cross-examination of a hostile witness and provides as follows:

> 154. Question by party to his own witness
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> The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

[8] Another provision that permits cross-examination as to previous statements in writing is s. 145 of the Evidence Act 1950. It reads as follows:

> 145. Cross-examination as to previous statements in writing
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> (1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without the writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.
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> (2) If a witness, upon cross-examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he made such statement.

[9] In this case, the first flaw is in respect of the procedure adopted to treat SP9 as a hostile witness. It is not in acccordance with the procedure suggested by Brown J in *Re Wee Swee Hoon, Deceased; Lim Ah Moy & Anor v. Ong Eng Say* [1953] 1 LNS 92; [1953] 1 MLJ 123 which is as follows:

> When a witness has given an answer or answers, which the party calling him knows to be in conflict with some statement or evidence which he has previously made or given, the proper procedure, in my opinion, is for Counsel then to ask him (as was done in this case) whether he made a statement (or gave evidence) at a certain place on a certain date. Having heard his answer (whatever it may be) no further questions should be put at that stage. But Counsel should then hand to the Judge the statement (or record of the evidence), and apply for leave to cross-examine him under the provisions of section 155 of the Evidence Ordinance. The Judge, having given the other side an opportunity of seeing the document and making his submissions on the application, will then give his ruling. That, in my view, is the proper procedure, in a situation of this kind.

[10] The effect of a party to the proceedings declaring it's own witness hostile can best be seen at p. 2426 of the celebrated text, *Sarkar's Law of Evidence*, 16th edn., 2007 which reads as follows:

> Effect of Cross-Examining a Party's Own Witness - It was held in *Surendra v. Raneee Dassi* 47 C 1043; 24 CWN 860 (relying on *Faulkner v. Brine* 1858 1 F & F 254), where however, the earlier case of *Bradley v. Ricardo* (1831) 8 Bing 57 was not cited that when a witness is cross-examined by the party calling him, his evidence cannot be believed in part and disbelieved in part, but must be excluded altogether. This view was affirmed in a series of decisions (see *R v. Satyendra* 37 CLJ 173; 71 IC 657; *Khijiruddin v. R* 53 C 372; A 1926 C 139; 27 Cri LJ 266 (approved in *Jagir v. SA* 1975 SC 1400); *Maqbul v. R* 32 CWN 872; 56 C 145; *Bikram v. R* 50 CLJ 467; *Panchanan v. R* 57 C 1266; 34 CWN 526) and it was held that omission to tell the jury to reject the evidence altogether amounted to a misdirection. The above doctrine was based on the view that the object of cross-examination of a party's own witness was to discredit the witness and amounted to an admission that he was not a witness of truth. But the only object of cross-examination is not only to impeach the credit of a witness but also to compel him to make admissions favourable to the cross-examiner and to find out the truth, although in certain circumstances it may have the effect of discrediting the witness altogether. In *Bradley v. Ricardo*, Tindal CJ, said: it has been urged as an objection that this would be giving credit to the witness on one point after he had been discredited on another; but difficulties of the same kind occur in every cause where a jury has to decide on conflicting testimony. *Bradley v. Ricardo* was not cited in any of the above cited cases. See further, *Summer Leivesley v. Brown & Co* (1909) 25 TLR 745.

[11] Closer to home is the case of *PA Anselam v. Public Prosecutor* [1940] 1 LNS 64; [1941] MLJ 157. In that case a witness was treated as hostile with the leave of the court and was cross-examined on a previous unsworn statement. In commenting on the value of the witness's evidence, Horne J (as he then was) said at p. 157 as follows:

> … such cross-examination is not for the purpose of substituting the unsworn statement for his testimony given in open court on affirmation. All that such a cross-examination can do is to prevent the court giving any value to his sworn statement that the women always paid the rent. The Magistrate was clearly wrong in placing any reliance upon this witness. His evidence should have been treated as negligible and the verdict found on the rest of the evidence; *R v. Harris* (1927) Cr App R 144.

[12] The effect of a previous unsworn out of court statement can never be a substitute for sworn testimony can be seen in a number of cases. The Federal Court, speaking through Salleh Abas FJ (as he then was) in the case of *Krishnan & Anor v. Public Prosecutor* [1981] 1 LNS 206; [1981] 2 MLJ 121 at p. 124 had this to say:

> ... It must be remembered here that, lest we may be misunderstood, the proof of the inconsistent statement whether under caution or not, under this procedure, does not constitute evidence of fact, but only evidence of inconsistency because of the contradiction of the evidence of the witness with his former statement. In other words the former statement is not replacing his evidence which has been contradicted, but only renders his evidence completely untrustworthy.

[13] It was once again pointed out by Edgar Joseph Jr J (as he then was) in *Sebastiano Robert Pavone v. PP* [1985] 2 CLJ 91; [1985] CLJ (Rep) 753; [1986] 1 MLJ 72, that the record of proceedings of the original trial, under the circumstances, can only be used for the purposes of cross-examining a witness under ss. 145(1) and 155(c) of the Evidence Act 1950 and they can on no account constitute substantive evidence at the trial. Reference is made to p. 756 (CLJ); p. 74 (MLJ) of the report which states as follows:

> ... With respect, the competence of ASP Fariddudin to speak as to the nature of the offending exhibit although obviously relevant to the question whether his evidence or that of the chemist should be preferred by the court, has no relevance whatsoever to the application for impeachment. It must be recognised that the record of proceedings at the original trial can only be used for the purpose of cross-examining ASP Fariddudin under the provisions of ss. 145(1) and 155(c) of the Act. It can on no count constitute substantive evidence at the retrial. By analogy, I would refer to the Privy Council cases of *Brij Bhushan Singh v. R* and *Mamand v. Emperor*, which are authorities for the proposition that a statement made under s. 164 of the Indian Criminal Procedure Code (equivalent to the old s. 113 of our Code) used for purposes for impeaching the credit of witness cannot be used as substantive evidence. Such a statement can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false but that does not establish that what he stated out of court under the section is true.

[14] Even in ordinary circumstances, quite apart from proceedings under s. 154 of the Evidence Act 1950, the evidence of this sort of shifting witness can only have trifling weight or rather, no weight can be attached to his testimony. In dealing with the testimony of this sort of witness, Edgar Joseph Jr J (as he then was) in the case of *Khoo Cheng Huat v. Public Prosecutor* [1990] 2 CLJ 790; [1990] 2 CLJ (Rep) 236; [1991] 1 MLJ 42 had this to say at p. 240 (CLJ); p. 45 (MLJ):

> As Spenser-Wilkinson J said when speaking for our then Court of Appeal, in *Goh Ah Yew v. Public Prosecutor*.
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> > A witness cannot be regarded as a split personality who is regarded as worthy of credit at one moment and untrustworthy at another.
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> In omitting therefore, to direct herself as aforesaid, and in consequence, in omitting to reject the testimony of the complainant and his wife in its entirety, the learned president had misdirected herself seriously, on the facts, and on this ground alone the conviction cannot stand.

[15] Recently, the Federal Court had occasion to comment on the testimony of suspect witnesses in the case of *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301. His Lordship Gopal Sri Ram FCJ had this to say at p. 647 (CLJ); p. 317 (MLJ) as follows:

> … The fact remains that PW8 had made a previous statement to PW3 which was inconsistent with his evidence in court. This, at the very least, had the effect of rendering his evidence suspect. It most certainly required the trier of fact to approach that evidence with caution. As Ali J (later Ag LP) said in *Mohamed bin Kasdi v. Public Prosecutor* [1968] 1 LNS 78.
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> > No hard and fast rule can be laid down for determining the credibility or otherwise of a witness, but when a witness gives or makes two statements which differ in material particulars there must necessarily be ground for believing that he is not a truthful witness.

[16] Now reverting back to the procedure adopted by learned deputy to declare her own witness, Rajamal a/p Ramasamy, SP9 as hostile. SP9 is the wife of the accused and the last witness called by the prosecution. In the course of examination-in-chief of SP9, learned deputy made an application to court to treat SP9 as a hostile witness as her evidence appeared to have contradicted

with her recorded statement. SP9's statement was tendered, but unknown to us under what provision of the law the statement was recorded. It was not marked as an exhibit, therefore it did not form part of the appeal record. Neither the statement of SP9 was shown to learned counsel and invited submissions thereon. "Without having had sight of the statement, the defence could not have known the actual context or scope of the statement referred to by the prosecution. It is difficult to imagine how the defence could then have effectively cross-examined Chia on what the prosecution itself considered to be material points in his defence" per Yong Pung How CJ in the Singaporean case of *Yuen Chun Yii v. PP* [1997] 3 SLR 57. Unfortunately, the trial Magistrate allowed learned deputy's application to declare SP9 as hostile witness despite SP9's statement was not shown to learned counsel. Thus the procedure adopted herein was not in compliance with the useful guidelines made by Brown J in *Re Swee Hoon*'s case *supra*. In *Yuen Chun Yii*'s case, *supra* Yong Pung How CJ said that the primary safeguard is that the opposing party should be allowed to view the statement in question. Referring to the guidelines laid down by Brown J in *Re Swee Hoon*, *supra*, His Lordship, Yong Pung How CJ said:

> The highlighted portion above emphasises the need to strictly observe safeguards for the adverse party. Indeed, the primary safeguard is that the defence should be allowed to view the statement sought to be referred to. Irrespective of whether the correct procedure was under s. 161 EA (refreshing memory) or s. 156 EA (cross-examining one's own witness), the defence was entitled to view the statement.

[17] In the next two paragraphs, His Lordship Yong Pung How CJ further said as follows:

> The defence was eventually shown a copy of the CPIB statement only during re-examination, and permitted to cross-examine Chia after re-examination. To this extent, it may be arguable that no substantial prejudice was in fact occasioned. I would respectfully disagree. By permitting the prosecution to dictate both when the statement could be produced and whether the defence should be allowed to view it, these were serious irregularities which resulted in the improper admission of evidence, at least insofar as P 25 of the CPIB statement was concerned. In my view, this had operated unfairly to the defence.

[18] Be that as it may, the cross-examination of SP9 in this case by learned counsel continued until it was intercepted by the trial Magistrate telling learned counsel to cease cross-examining SP9 as she (ie, the trial Magistrate) did not accept SP9's evidence. The notes of proceedings at para. 6 p. 109 jilid 1 of the record of appeal reads as follows:

> Mahkamah: Saksi ini telah dijadikan sebagai hostile witness oleh pendakwaan dan Mahkamah telah mencatatkan bahawa keterangan saksi ini adalah meragukan. Peguambela tidak perlu teruskan pemeriksaan balas memandangkan keterangan saksi ini tidak diterima oleh Mahkamah.
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> (p. 109 of Appeal Record)

[19] There is no re-examination of SP9 by the prosecution.

[20] This is the second flaw in this case. It concerned the accused's right to cross-examine the prosecution witness. The trial Magistrate had stopped learned counsel from cross-examining the hostile witness, SP9, on the ground that her evidence (ie, SP9) was doubtful and it was not accepted by the court. By depriving the cross-examination of SP9, a material witness in this case, learned counsel contended that a miscarriage of justice had occurred and to support his contention the Federal Court case of *Dato' Mokhtar Hashim & Anor v. Public Prosecutor* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232 was referred to, where Raja Azlan Shah LP (as he then was) said:

> the order made by the learned trial judge in impeaching the credit of the witness Abdullah bin Ambek and denying the right to counsel for all the accused to cross-examine him was clearly wrong. When a witness's credit is sought to be impugned under the provisions of sections 145 and 195(c) of the Evidence Act his credit stands to be assessed as a whole with the rest of the evidence at the appropriate stage, that is to say at the close of the case for the prosecution or for the defence as the case may be. No immediate order of a summary nature can or should be made as was done in this case and the right of cross-examination or re-examination according to the circumstances should not be denied as it might well be that in the exercise of such right his credit might be repaired, restored or re-established.

[21] It is clearly wrong for the trial Magistrate to make an immediate summary order directing learned counsel to cease his cross-examination of SP9 because she was an unreliable witness and the trial Magistrate did not accept her evidence. The trial

A Magistrate should allow learned counsel to complete the cross-examination as the cross-examination is very wide and of course, it is subject to the rule of admissibility and relevancy. Thereafter, follow by re-examination. The credibility of SP9 should be appropriately assessed after the prosecution close its case.

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[22] Further, on the accused's right or rather constitutional guaranteed rights under art. 5(1) of the Federal Constitution to complete cross-examination of a material prosecution witness, I have recently decided in the case of *Kamalan Shaik Mohd v. PP* C [2013] 4 CLJ 396 at pp. 409 and 410 as follows:

> [31] Guided by the provision of s. 173(e) of the CPC and a well reasoned and illuminating judgment of Gopal Sri Ram FCJ in *Lee Kwan Woh*, *supra* and the persuasive decision of *State v. Khumalo*, *supra*, it is my considered judgment that an accused in a criminal D trial has a constitutionally guaranteed rights to a fair trial which include to complete cross-examination of a material witness, in this case, SP6. This rights of cross-examination is mandatory as the word "shall" is used in s. 173(e) CPC. The accused's rights encompasses to cross-examine all the witnesses produce by the prosecution, if he deems fit. The expression "all the witnesses" E in s. 173(e) means firstly, any number of witnesses tender by the prosecution and secondly, the cross-examination of each and every witness, if so desires by the accused, must be in full or complete. There cannot be a partial or an incomplete cross-examination of the prosecution witness or witnesses.
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> [32] In the present case, the accused is yet to complete his cross-examination of SP6. SP6 must be offered and produced, not by the defence but by the prosecution for the purpose of the former completing his rights of cross-examination of SP6. Without an opportunity being offered or made available for continued G cross-examination is not a sufficient compliance with the requirements of the law. Following next, is re-examination of SP6 if so desires by learned Deputy. The trial is still at the prosecution stage. To the chagrin of the accused, the prosecution acknowledged its oversight for not recalling SP6 for further cross-examination. H It deprived the accused to put his case to the fullest. The accused, accordingly, do not have a fair trial and art. 5(1) is violated. On the facts of this case, a constitutional guaranteed rights of the accused has been found to be flouted. "If there is an infraction of these rights, the accused is entitled to an acquittal" per Gopal Sri Ram FCJ in *Lee Kwan Woh*, *supra*.

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[33] Further, no opportunity was given to the accused to exhaustively complete cross-examination is a clear infringement of the mandatory provision of s. 173(e) CPC. The accused "has not had what the law says that he shall have", thus justice has been miscarried - commonly called miscarriage of justice. Speaking for the High Court of Australia in *Mraz v. The Queen* [1955] 93 CLR 493 Fullagar J said at p. 514 in the following terms:

> ... every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedures and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly opened to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law.

[23] On appeal, my decision in *Kamalan Shaik Mohd*'s case, *supra* was unanimously affirmed by the Court of Appeal and, I do not intend to depart from the principle enunciated in *Kamalan Shaik Mohd*'s case which I am of the considered view is applicable with full force relating to the denial of the accused's rights to cross-examine the hostile witness, SP9, coupled with the non-compliance of the procedure by the prosecution to treat its own witness as hostile as suggested by Brown J in *Re Wee Swee Hoon*'s case, *supra* and further explained by Yong Pung How, CJ in *Yuen Chun Yii*'s case, *supra*. As a result, the accused is not accorded with a fair trial which has occasioned a miscarriage of justice.

[24] Accordingly, the accused's appeal is hereby allowed. His conviction and sentence by the trial Magistrate is set aside. The accused is acquitted and discharged.